

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT LEE HANNING, et al.,)	
)	
Plaintiffs,)	Case No. 1:05-cv-360
)	
v.)	
)	
HOMEcomings FINANCIAL)	
NETWORK, INC.,)	<u>ORDER</u>
)	
Defendant.)	
)	

This matter is before the court on plaintiffs’ motion to file an amended complaint. Plaintiffs’ amended complaint would dismiss fifteen of the nineteen causes of action set forth in the original complaint, leaving four claims pending. The amended complaint also names an additional defendant, Novastar Mortgage, Inc. Plaintiffs’ motion for leave to amend was filed after defendant filed its motion to dismiss under Fed. R. Civ. P. 12(b)(6) and purports to cure deficiencies raised in defendant’s motion. Defendant opposes the motion to amend, asserting that the four remaining claims are meritless and that amendment would therefore be futile.

Motions to amend are governed by Rule 15 of the Federal Rules of Civil Procedure. Rule 15(a) allows a party to amend his pleading once as a matter of course “at any time before a responsive pleading is served.” In the present case, defendant’s only response to the original complaint was a motion to dismiss (docket # 8). The only documents qualifying as “pleadings” under the Federal Rules are complaints, answers, replies to a counterclaim, answers to a crossclaim,

third-party complaints, and third-party answers. FED. R. CIV. P. 7(a). A motion to dismiss is not a “responsive pleading” within the meaning of Rule 15(a) and therefore does not terminate the time within which plaintiff may amend his pleading as a matter of right. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003); *Stein v. Royal Bank of Canada*, 239 F.3d 389, 392 (1st Cir. 2001); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1483 at 584-87 (2d ed. 1990). Consequently, plaintiffs may still amend their complaint as a matter of right. Defendant’s objections to the substance of the complaint are not germane to the issue of amendment at this stage, but may be addressed by subsequent motion. Accordingly:

IT IS ORDERED that plaintiffs’ motion for leave to file an amended complaint (docket # 15) be and hereby is GRANTED. Plaintiffs are directed to electronically file a first amended complaint, with appropriate signature blocks as required by W.D. Mich. LCivR 5.7(e)(i), no later than **August 30, 2005**.

IT IS FURTHER ORDERED that Novastar Mortgage, Inc. is hereby added as a party defendant, with summons to issue.

IT IS FURTHER ORDERED that defendant Homecomings Financial Network, Inc. is granted 20 days after service of the first amended complaint in which to move, answer, or otherwise plead thereto. Defendant’s pending motion to dismiss (docket # 8) is hereby DISMISSED WITHOUT PREJUDICE as moot.

DONE AND ORDERED this 24th day of August, 2005.

/s/ Joseph G. Scoville
United States Magistrate Judge